

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1990-1

JANUARY 24, 1990

The Committee has been asked by a Delaware law firm (the "Firm") for an opinion as to whether the Firm may signal its client, XYZ Corporation ("XYZ"), to expedite its work on a project for ABC Corporation ("ABC"), another client of the Firm who is considering suing XYZ because of its delay on the project.

Approximately three years ago, the Firm represented ABC regarding a problem ABC was having with a software program it had purchased. At that time, ABC hired XYZ to write a new software package. As counsel for ABC, the Firm drafted a contract between ABC and XYZ ("the contract"). Thereafter, XYZ retained the Firm as its counsel with full knowledge that the Firm could not represent XYZ in any matters relating to its contract with ABC. The Firm continues to represent ABC in other matters.

The Partner of the Firm who has dealt primarily with ABC and XYZ has received a telephone call from the president of ABC with respect to another matter. During that call, ABC's president noted that ABC was displeased with XYZ's performance of the contract and, aware that the Firm also represents XYZ, that ABC had hired another attorney to investigate a potential lawsuit against XYZ.

The Partner conveyed to ABC his understanding that he was not being retained as ABC's counsel in the matter because of his Firm's current representation of XYZ and because he might be a fact witness in the dispute between ABC and XYZ over the contract, which he had

drafted. He did not seek ABC's consent to disclose to XYZ either ABC's unhappiness with XYZ's performance or the potential for litigation.

OPINION

As counsel for ABC with respect to the contract, the Firm should not disclose to XYZ the need to expedite the work under the contract or the potential for a lawsuit, without ABC's consent.

DISCUSSION

A fundamental principle of legal ethics is the duty of confidentiality owed by attorneys to their clients. The Delaware Lawyers' Rules of Professional Conduct expressly establish this duty. Rule 1.6 states in pertinent part (emphasis added):

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are Impliedly authorized in order to carry out the representation . . .

The duty of confidentiality continues even after the lawyer-client relationship has terminated.

Rule 1.6 thus imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed. It does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental. Furthermore, this definition avoids the constricted definition of "confidence" that appears in some decisions.

Delaware Lawyers' Rules of Professional Conduct Rule 1.6, comment (1985) (emphasis added).

The Firm represented ABC with respect to the contract and ABC remains a client of the Firm in other matters. ABC has the right to expect the loyalty of the Firm with respect to any communications relating to the contract. The fact that the Firm does not represent ABC in its dispute with XYZ does not relieve it of its duty to maintain ABC's confidences with respect to matters relating to the contract.

Rule 1.9, which deals with conflicts of interest involving former clients, also offers guidance:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

(Emphasis added). See also Rule 1.8(b).

The Third Circuit set forth the purpose of Rule 1.9:

Without such a rule, clients may be reluctant to confide completely in their attorneys . . . [Moreover], the rule is important for the maintenance of public confidence in the integrity of the bar . . . Finally, and importantly, a client has a right to expect the loyalty of his attorney in the matter for which he is retained.

In re Corn Derivatives Antitrust Litigation, 748 F.2d 157, 162 (3d Cir. 1984) (citations omitted).

See also Delaware State Bar Association Committee On Professional Ethics, Opinion 1982-1;

Richardson v. Hamilton International Corp., 469 F.2d 1382, 1384 (3d Cir. 1972).

The disclosure of ABC's litigation plans by the Firm might disadvantage ABC.

Strategic reasons may exist for failing to disclose the possibility of legal action prior to its

institution. In any event, as set forth above, the lawyer may not "speculate whether particular information might be embarrassing or detrimental." Rule 1.6, comment.

An attorney's duty to maintain confidences may not be set aside lightly. Under Rule 1.6, the only circumstances under which an attorney may disclose a client's confidences are:

- (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client

The Firm's desire to mitigate economic harm to XYZ does not fall within these two very limited exceptions permitting the disclosure of client confidences. Thus, in the absence of ABC's consent, the Firm may not disclose to XYZ the information from ABC.

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